Filed 11/20/01

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ISRAEL VASQUEZ, Defendant and Appellant.	F034527 (Super. Ct. No. 623021-9) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jane York, Judge.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Harry J. Colombo and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Respondent.

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PROCEDURAL HISTORY

By amended information, Israel Vasquez (defendant) was charged with attempted murder (count 1; Pen. Code, §§ 664/187, subd. (a)[1]), assault with a firearm (count 2;

[1] All statutory references are to the Penal Code unless otherwise indicated.

§ 245, subd. (a)(2)), and possession of methamphetamine (count 3; Health & Saf. Code, § 11377, subd. (a)). As to count 1, it was further alleged that defendant personally and intentionally discharged a firearm (§ 12022.53, subds. (b)-(c)). With respect to both counts 1 and 2, it was also alleged that defendant personally used a firearm (§ 12022.5, subd. (a)(1)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)). Defendant pled not guilty to all counts and denied the allegations.

A jury found defendant guilty on count 1 of the lesser offense of attempted voluntary manslaughter, and guilty on counts 2 and 3 as charged. The jury also found true the allegations that defendant personally used a firearm and personally inflicted great bodily injury. Defendant was sentenced to a total of 16 years as follows: the middle term of 3 years on count 1, plus 10 years for the firearm use enhancement and 3 years for the infliction of great bodily injury enhancement, and concurrent terms on counts 2 and 3.

FACTUAL HISTORY

On the evening of October 9, 1998, the Chacon family held a party for the youngest son, Daniel, after he returned from two weeks of basic training with the United States Army. Between 50 and 100 family members and friends were invited to the backyard celebration. Approximately 75 guests attended the party, including defendant and several of his friends, although they were not invited. Philip Chacon, the older brother of Daniel, and two guests, Hector Luna and Silvester Balero, testified that they did not see any guns at the party. Philip was aware Luna was a gang member, but believed he would not engage in any gang activity at the house. To Philip's knowledge, no other gang members were invited to the party. Luna recognized one of defendant's friends, Jimmy Vela, was in a gang that rivaled one of Luna's former gangs.

At approximately 1:30 or 2:00 a.m. the following morning, Philip, Daniel, Luna, Balero, and two other friends of the Chacons attempted to persuade the remaining guests to leave. Defendant, Vela and their friends, however, did not want to leave. According to Luna, they were cussing and yelling gang-related statements such as "Bulldogs

forever." Defendant gave Balero an unfriendly stare and asked, "What's up dog?" Vela confronted Luna and threatened to beat him up. Luna described the group as "looking all crazy[]"and staring at him as they left. Vela advised he would return, and another of defendant's friends made reference to blasting.

Defendant and one of his friends left the party and walked toward defendant's truck. Defendant subsequently returned and walked into the backyard, holding a black hat in his hand tucked to his waist and wearing nylon pantyhose over his forehead. The only people remaining in the backyard were Phillip, Luna, Balero, Daniel, the disc jockey and two of the disc jockey's friends. Defendant approached Philip and Luna and asked if they had seen his friend Tommy, who was somewhere vomiting. The two responded that there was no one by that name in the backyard. Luna was wearing a shirt with the brand name Tommy Jeans. Luna believed he saw chrome under defendant's hat.

Defendant then walked behind Luna and started shooting at him from about three or four feet away. Defendant fired four shots in quick succession and then turned around and fired another shot. Luna was making no movements at the time the shooting took place. He was shot in the left arm, the back left shoulder and the stomach, and collapsed to the ground. Balero, who was standing approximately five feet away from Luna, was shot in the left leg. Philip chased defendant toward the front yard and tackled him. Defendant broke free and jumped into the back of his truck, as it was moving. Luna was taken by helicopter to a local hospital. In the area where the struggle ensued, Philip found the black hat defendant had been carrying and a .38 caliber revolver. The weapon had five empty shell casings inside the cylinder.

Police sent out a description of defendant's truck, and within approximately 30 minutes, defendant and his passenger were stopped. Defendant had a number of small cuts on his hands. Daniel and Balero were taken to the scene and identified defendant as the shooter. Police found a holster for a revolver and a woman's stocking in defendant's vehicle. Police also found a plastic baggie containing .842 grams of methamphetamine in

the police car in which defendant was transported. At approximately 7:30 a.m. later that morning, Javier Lopez, the cousin of defendant, reported that his .38 caliber gun had been stolen. The serial number of Lopez's weapon matched the revolver used in the shooting.

At trial, Thomas Alberda, an investigator with the sheriff's department, testified as an expert on gangs. Alberda explained that the Bulldogs gang originated in Fresno, but people from other areas "claim Bulldogs" and identify themselves with the color red. Alberda opined that defendant was a member of the Sanger Olivos Street Bulldogs, based on several factors: 1) he was arrested in 1993 with Sanger Sureno gang members; 2) he was found with four dots on his left fingers in 1994, signifying the North Sanger 14 gang, and claimed he was "jumped" into the gang; 3) he was arrested in 1996 and identified by police as a Norte gang member; 4) he admitted to police in 1996 he associated with Sanger Chankla 14; 5) he wrote a letter to a Los Olivos Street gang member at the Fresno County Jail in 1997 and acknowledged membership in that gang; 6) he was found with a Los Olivos Street gang member in 1998, wearing red; and 7) he twice admitted to police officers in 1998 that he was a Sanger Olivos Street gang member and had the tattoo of four dots on his left fingers.

Defense

Defendant testified in his own behalf. He stated that he learned of the Chacon party from his friend, Richard Trevino, who had been invited. Defendant, Trevino and Vela drove to the Chacon house, and Trevino remained in the truck while defendant and Vela entered the party. Defendant testified he recognized members of rival gangs who were giving Vela and him "bad looks." Luna and Balero asked defendant and Vela, " 'What the fuck are you looking at'?" Defendant responded, "What's up dog?" Defendant and Vela then went to the backyard to get some beer. From approximately 27 feet away, defendant saw Balero hand Luna a black object with a chrome spot. Defendant believed Luna was handed a nine-millimeter handgun. According to defendant, he put his beer down and told Vela they should leave.

When defendant arrived at his truck, Vela was not with him. Defendant described Vela as "real puny" and unable to defend himself. Defendant testified that he grabbed a gun, put it in his waistband under a black windbreaker, and returned to the party. He asked a group of four or five people if they knew Vela's whereabouts. Defendant recounted that the group replied with a smart attitude, so he walked toward the back looking for Vela. When he passed by the group a second time, the individuals made statements challenging him to fight, and Luna pulled up his jacket and took out a gun. Defendant testified he wanted to run, but feared he would be shot in the back. Acting on instinct, defendant pulled out his gun, pointed it toward the crowd, turned his head and fired.

Defendant testified that he ran, but fell and was beaten with a stick. He escaped and called to Trevino, who was driving the truck away. Defendant jumped into the back of the truck and told Trevino to "just jam." The two found Vela at his home. The police later stopped defendant while he was taking Trevino home. Defendant admitted he received the package of drugs found in the police car from "some guy" at the party. He also admitted wearing pantyhose on his head at the time of the shooting and using his cousin's gun, but denied stealing it. Defendant further admitted he lied to police in stating he did not know about any shooting.

Defendant never told the police he was being threatened at the party or that he shot in self-defense. He admitted he was a member of the Sanger Olivos Street gang some years earlier, but denied participating in gang activity at the time of trial.

DISCUSSION

Defendant contends the court committed reversible error in failing, sua sponte, to instruct the jury on self-defense and to give a limiting instruction on the use of gang evidence. We find reversible error in the court's failure to provide adequate self-defense instructions.

I. Standard of review

We set forth the applicable standard of review for alleged instructional error in *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112:

> "A trial court must instruct the jury 'on the law applicable to each particular case.' [Citations.] '[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' [Citation.] Therefore, a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citations.] In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.]
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> "The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law ….' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole … [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]" ' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]"

II. Self-defense instructions

Defendant contends the court erred in failing, sua sponte, to give the jury self-defense instructions. The People argue the jury was adequately instructed, and any alleged error was invited by defendant and harmless.

"It is settled that a court must instruct on general principles of law that are closely and openly connected with the facts of the case. [Citation.] The duty to instruct sua sponte on general principles encompasses the duty to instruct on defenses that are raised by the evidence …." (*People v. Perez* (1992) 2 Cal.4th 1117, 1129; see also *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [trial court charged with instructing upon every theory of case supported by substantial evidence, including defenses that are not inconsistent with defendant's theory of the case]; *People v. Holt* (1944) 25 Cal.2d 59, 64-65 [appropriate instructions on self-defense must be given if warranted by the evidence].) However, the court " ' "… need not instruct on its own motion on specific points

developed at the trial." [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.)

We note at the outset that the jury was provided with some self-defense instructions. Defendant's argument is that the court failed in its sua sponte duty to fully instruct on self-defense, specifically to provide the jury with CALJIC No. 5.10 [resisting attempt to commit felony]; CALJIC No. 5.12 [justifiable homicide in self-defense]; and CALJIC No. 5.15 [charge of murder—burden of proof re justification or excuse]. In analyzing defendant's claim, it is useful to set forth the difference between perfect and imperfect self-defense.

> "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] As the Legislature has stated, '[T]he circumstances must be sufficient to excite the fears of a reasonable person ….' [Citations.] Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm…." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted.)

Defendant received appropriate instructions on imperfect self-defense. The jury was instructed with a modified version of several combined instructions--CALJIC No. 8.40 [voluntary manslaughter—defined], CALJIC No. 8.42 [sudden quarrel or heat of passion and provocation explained], CALJIC No. 8.50 [murder and manslaughter distinguished], and CALJIC No. 8.66 [attempted murder], as follows:

> "Every person who unlawfully attempts to kill another human being without malice aforethought but with an intent to kill, is guilty of attempted voluntary manslaughter ….
>
> "There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] … [¶]

"When the direct but ineffectual act done by one person towards killing another human being, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, or in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is attempted voluntary manslaughter.…

"To establish that the offense is attempted murder and not attempted voluntary manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of attempted murder and that the direct but ineffectual act done by one person towards killing another human being was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.

The People concede defendant was also relying on perfect self-defense, and the record supports the concession. In his closing argument, defense counsel stated:

"We know that [defendant] [shot Luna]. He admitted to doing it, but what he didn't admit to was that he did it without any justification.

"… This is a jury instruction that will be read.… [I]t says that a person is not guilty of a crime when he engages in conduct otherwise criminal when acting under threats and menaces under the following circumstances, and it lists the circumstances here. And I'll tell you right now, you'll have these instructions, so you don't need this, but number one and number two listed are what we call objective and subjective. Both components have to be present. It means that objectively it had to be reasonable. That these threats and menaces had to be reasonable to a reasonable person. That's the objective component.

"The subjective component is number two, if this person then believed that his life was so endangered, and it includes this rule does not apply to future danger -- fear of future danger.

"When [defendant] came back into the backyard, he was confronted with the situation that he was unfamiliar with, a situation where he had to make a decision as to what to do.

"There were a couple of decisions that you probably -- you can possibly take issue with. Maybe [defendant's] decision to go to the party … was a mistake …. But when you -- when he was confronted with that decision, he had to make it immediately. He felt -- because he'd seen a gun before and he saw it again, and he felt threatened, and he felt that his life was in danger. And the question is, should he have waited, should he have

waited until [Luna] pointed the gun at him to decide to shoot back? Should he have waited until he shot -- [Luna] shot at him to decide to shoot back? I know it seems -- it almost seems kind of like the Old West or something when he says that, well, you know, he did this, and I saw the gun, and, you know, it's like the quick draw. I don't think -- I don't think we're talking about, you know, two guys who were lined up, each of whom knows that the other person is carrying a gun and going to shoot the other person. When [defendant] went back to the party, he was aware that he had a gun. He was also aware that [Luna] had previously had a gun. [Luna] didn't know that about [defendant]. So [Luna] didn't have to -- didn't have to try to -- try to put off any threat.… [¶] … [¶]

"… [B]ut what kind of person is [Luna]? He got shot. He got hurt very badly. A certain -- to a certain extent you have to have sympathy for a person who is shot like he was. It's altogether possible that he could have died as a result of what happened. But the problem is, he is not entirely without blame either. He has some blame. He has some culpability that he obviously has not been willing to accept. He's not willing to admit that he had a gun, too, and that he got shot before he could do anything with that gun.

"If [defendant] hadn't hit him when he shot at him, we may be dealing with another type of case. We may be -- we may have been dealing with a murder case with [defendant] as the victim. But we're not. We're here, we're dealing with this case as it sits, as it is presented to you."

The People acknowledged in their closing argument that defendant was raising perfect self-defense. And the evidence, largely in the form of defendant's testimony, supported a theory of perfect self-defense. Defendant testified the guests at the party were giving Vela and him "bad looks." He also testified that, after making statements challenging him to a fight, Luna pulled up his jacket and took out a gun. The People appear to recognize CALJIC Nos. 5.10, 5.12 and 5.15 are generally mandatory instructions in such a case, but maintain the other self-defense instructions were adequate.

Here, the jury was instructed with CALJIC No. 4.40 [threats and menaces], as follows:

"A person is not guilty of a crime when [he] engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

"1. Where the threats and menaces are such that they would cause a reasonable person to fear that [his] life would be in immediate danger if [he] did not engage in the conduct charged, and

"2. If this person then believed that [his] life was so endangered.

"This rule does not apply to threats, menaces, and fear of future danger to [his] life[.]"

The jury was also instructed with CALJIC No. 5.51 [self-defense—actual danger not necessary]:

"Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in [his] mind, as a reasonable person, an actual belief and fear that [he] is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing [himself] in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

The jury was further instructed with CALJIC No. 5.55 [plea of self-defense may not be contrived]: "The right of self defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." Finally, with respect to count 2, the jury was instructed with a modified version of CALJIC No. 9.00:

"In order to prove an assault, each of the following elements must be proved:

"1. A person willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person; [and]

"[2. At the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person …] [¶] … [¶]

"[A willful application of physical force upon the person of another is not unlawful when done in lawful [self-defense]. The People have the burden to prove that the application of physical force was not in lawful

[self-defense]. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty.]"

Looking at these instructions as a whole, it is apparent the fundamental concepts of CALJIC Nos. 5.10, 5.12 and 5.15 were not adequately covered. CALJIC No. 5.10 states: "Homicide is justifiable and not unlawful when committed by any person who is resisting an attempt to commit a forcible and atrocious crime." CALJIC No. 5.12, in turn, provides, in relevant part:

> "The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:
>
> "1. That there is imminent danger that the other person will either kill [him] [her] or cause [him] [her] great bodily injury; and
>
> "2. That it is necessary under the circumstances for [him] [her] to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to [himself] [herself]."

And CALJIC No. 5.15 reflects the burden of proof regarding justification or excuse: "Upon a trial of a charge of murder, a killing is lawful, if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

CALJIC Nos. 4.40, 5.51 and 5.55 do not define the circumstances for justifiable self-defense. We cannot presume, in light of these instructions, that the jury fully understood defendant, under the proper set of circumstances, had the right to use deadly force against Luna. (Cf. *People v. Walton* (1996) 42 Cal.App.4th 1004, 1020-1021, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [jury instructed with CALJIC Nos. 4.40, 5.10, 5.12, 5.13, 5.15, 5.17, 5.30, 5.50, 5.51].) More significantly, the instructions fail to explain the burden of proof in a case of perfect self-defense. The due process clause requires "the prosecution [to] prove beyond a reasonable doubt the absence of justification … when the issue is properly presented in a homicide

case." (*People v. Banks* (1976) 67 Cal.App.3d 379, 384.) Justifiable self-defense and the related burden of proof are general principles of law pertinent to the case. The court had a sua sponte duty to instruct on these principles. (See *People v. Holt*, *supra*, 25 Cal.2d at pp. 64-65.) Thus, the court erred in failing to adequately instruct the jury on self-defense.

Contrary to the People's assertions, we find nothing in the record to suggest defendant invited the error by relying on CALJIC No. 4.40 in his closing argument. When a defense attorney makes a "conscious, deliberate tactical choice" to forego a particular instruction, or to request a particular instruction, the doctrine of invited error bars a claim of error on appeal. (*People v. Lucero* (2000) 23 Cal.4th 692, 723-724; *People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Hardy* (1992) 2 Cal.4th 86, 152 [error invited when counsel manifests legitimate tactical reason for requesting instruction].) However, the invited error doctrine does not apply where defense counsel suggests or accedes to the erroneous instructions because of neglect or mistake. (*People v. Graham* (1969) 71 Cal.2d 303, 319; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) In this case, the record does not disclose any explicit or implicit tactical reason to forego the self-defense instructions.

We further disagree with the People's claim that the court's error was harmless. The jury found defendant guilty of attempted voluntary manslaughter, rather than attempted murder. As a result, the jury had to believe, at least in part, defendant's testimony. It found defendant acted in the heat of passion or in the actual but unreasonable belief in the necessity to defend himself. Had the jury been fully and properly instructed on self-defense, it may have acquitted defendant. The absence of CALJIC Nos. 5.10, 5.12 and 5.15 left the jury with no clear guidance on the circumstances constituting justifiable self-defense and how the burden of proof was to be allocated in proving or disproving such self-defense. "[A] constitutionally deficient reasonable doubt instruction is not amenable to a harmless error analysis and requires reversal per se." (*People v. Phillips* (1997) 59 Cal.App.4th 952, 956; see also *Sullivan v.*

Louisiana (1993) 508 U.S. 275, 277-282.) "We must be ever diligent to guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (*People v. Crawford* (1997) 58 Cal.App.4th 815, 826.)

We find the inadequate instructions related to self-defense affected not only the attempted voluntary manslaughter conviction, but also the assault conviction. The doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander. (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1023-1024; see also *People v. Levitt* (1984) 156 Cal.App.3d 500, 507 [under doctrine of transferred intent, "one's *lack* of criminal intent follows the corresponding *non*-criminal act to its unintended consequences"].)

Therefore, the court committed reversible error in failing to adequately instruct the jury on self-defense with respect to counts 1 and 2. As a result of our finding, it is not necessary to address defendant's remaining contention that the court committed reversible error in failing to give, sua sponte, a limiting instruction on the use of gang evidence.

DISPOSITION

The judgment on counts 1 and 2 are reversed. The judgment is affirmed with respect to count 3.

WISEMAN, J.

WE CONCUR:

ARDAIZ, P.J.

POLLEY, J.*

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* Judge of the Tuolumne Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.